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IN THE

Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

—and—

SHAFIQ RASUL, *et al.*,

Petitioners,

—v.—

UNITED STATES, *et al.*,

Respondents,

—and—

GEORGE W. BUSH, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF THE HUMAN RIGHTS INSTITUTE OF THE INTERNATIONAL BAR ASSOCIATION IN SUPPORT OF PETITIONERS

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Interest of the Amicus Curiae

The amicus, the Human Rights Institute of the International Bar Association (the "Institute") is an international body, headquartered in London, England, that helps promote, protect and enforce human rights under a just rule of law, and works to preserve the independence of the judiciary and legal profession worldwide.[1] Founded in 1995 under the Honorary Presidency of Nelson Mandela, the Institute now has more than 7,000 members worldwide.

The amicus does not seek to comment on the merits of any claims or defenses that Petitioners might raise in a hearing. Rather, its interest in the case is in encouraging this Court to recognize the fundamental, long-standing principle that domestic law should be interpreted in conformity with international law, where possible. By presenting its views in this brief, the amicus hopes to assist the Court in safeguarding the role of international law in United States law and fulfilling the expectations of other States based on entrenched international law.

Statement

Petitioners are detained at the U.S. Naval Base at Guantanamo Bay by U.S. armed forces. For over nineteen months, Petitioners have been imprisoned without

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[1] No counsel for a party authored this brief in whole or in part. This brief was prepared by the Human Rights Institute of the International Bar Association, and its counsel: Vaughan Lowe, Barrister, Essex Court Chambers, and Chichele Professor of Public International Law and a Fellow of All Souls College, University of Oxford; Guy S. Goodwin-Gill, Barrister, Blackstone Chambers, Senior Research Fellow of All Souls College and formerly Professor of International Refugee Law at the University of Oxford; and Allen & Overy, New York. No person other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief.

recourse to court process or access to counsel. Petitioners are citizens of the United Kingdom, Australia and Kuwait. Petitioners are not "enemy aliens," since they are citizens of friendly States, nor are they "enemy combatants," since the government has offered no evidence or grounds for such classification. *See Odah v. U.S.*, 321 F.3d 1134, 1138 (D.C. Cir. 2003).

The U.S. maintains exclusive authority and control over the Naval Base at Guantanamo Bay, which the U.S. occupies under a lease from the Government of Cuba. While Cuba retains "ultimate sovereignty," the U.S. has "control and jurisdiction" until both States agree otherwise. *Agreement Between the U.S. and Cuba for the Lease of Lands for Coaling and Naval Stations*, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

Protection against arbitrary detention is guaranteed by virtually every State's domestic laws, but it does not end at any one State's border. International law guarantees this fundamental right for any person detained under the authority and control of a State, regardless of whether the detention occurs within the State's sovereign territory. The guarantee applies in times of war, as well as peace.

Adherence to principles of international law in this case is particularly significant in light of the leadership role that the U.S. plays in world affairs. Friendly nations watch the U.S. with expectations based on widely accepted international law and shared legal traditions. Unfriendly nations look for an opportunity to accuse the U.S. of violating minimal standards of international law or to seize upon an American precedent to justify or obscure their own violations.

Summary of Argument

U.S. law should be interpreted so as to comply with obligations under international human rights law and international humanitarian law, especially where there is a broad consensus in the international community regarding a fundamental right.

International human rights law imposes an obligation on the U.S. to provide every person detained under its authority and control access to a court for the purpose of reviewing the lawfulness of his detention, regardless of whether the U.S. retains formal sovereignty over the location of the detention.

Under international humanitarian law, the U.S. is required to provide every person detained in connection with alleged involvement in an armed conflict with a prompt determination as to whether he is accorded "prisoner of war" status. Prolonged delay of this determination without access to counsel or judicial review results in arbitrary detention, contrary to both humanitarian and human rights law.

Argument

I. United States Law Should Comply with International Human Rights and Humanitarian Law

United States law should be interpreted so as to recognize the federal courts' jurisdiction to hear Petitioners.[2]

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[2] The amicus makes no comment on issues that split the lower courts as to whether, or how, an obligation that binds the U.S. as a matter of international law may create a private cause of action for its violation in federal courts under the Alien Tort Claims Act, 28 U.S.C. § 1350, or otherwise. *See, e.g., Odah*, 321 F.3d at 1145-1149 (Randolph J., concurring) (noting circuit split). The amicus simply urges the Court to respect international law in interpreting jurisdiction under

It is an accepted principle that domestic law should be interpreted in accordance with international obligations, where possible. This Court applied this principle in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and should likewise do so here.

A. The Rule in Favor of Harmony with International Law

The principle that domestic law should be interpreted so as to avoid violations of international obligations, where fairly possible, is well-established in the U.S. and other States. *See, e.g., Restatement (Third) of Foreign Relations Law of the United States* §§ 114-15 (1987); Ian Brownlie, *Principles of Public International Law*, 42-51 (4th ed. 1990).[3]

This Court has applied the principle of construction in favor of harmony with international law in a wide variety of cases. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 254-61 (1984) (finding air carrier's declared liability limit was consistent with an international air carriage treaty that the U.S. adhered to for 50 years and had not been repudiated); *Weinberger v. Rossi*, 456 U.S. 25, 29-30, 32-33 (1982) (looking to international law in interpreting statute that prohibited employment discrimination against U.S. citizens on military bases overseas unless permitted by

U.S. law, including the *habeas corpus* statute, 28 U.C.S. § 2241. *See Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980); *Beharry v. Ashcroft*, 183 F. Supp. 2d 584 (E.D.N.Y.), *rev'd on other grounds*, No. 98 CV 5381 (JBW), 2003 U.S. App. LEXIS 8279 (2d Cir. May 1, 2003).

[3] Even when deciding constitutional questions without any international dimension, this Court considers international law as a reflection of the "values that we share with a wider civilization." *Lawrence v. State*, 123 S. Ct. 2472, 2483 (2003); *see also Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002).

treaty); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (in maritime tort case, looking to law of nations in determining statutory construction of Jones Act); *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (in admiralty case, noting that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country"); *cf. McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963) (finding National Labor Relations Act did not apply to foreign vessels manned by alien crews because such laws "would raise considerable disturbance not only in the field of maritime law but in our international relations as well").

The rationale for interpreting domestic law in harmony with international law loses none of its force when a fundamental human right is involved. Indeed, the U.S. strives to enforce fundamental rights widely to the benefit of the world community, its allies, and its own citizens abroad. *See, e.g., Case Concerning U.S. Diplomatic and Consular Staff in Tehran*, (U.S. v. Iran) 1980 I.C.J. 3, at ¶¶ 23, 69 (May 24) (upholding claims of inhumane treatment of U.S. citizens). Expectations of other States based on international law should be fulfilled so as to foster goodwill among States and encourage compliance in the future. Particularly with respect to States with whom the U.S. shares a common history of commitment to the rule of law, expectations should not be lightly ignored.[4]

[4] For example, in *The Queen on the Application of Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] All E.R. (D) 70 (C.A. 2002), the English Court of Appeal declined to compel the British Secretary of State to make representations to the U.S. concerning the detainees at Guantanamo Bay, but

B. Applying *Johnson v. Eisentrager* Today

In holding that the U.S. courts lacked jurisdiction to hear Petitioners, the D.C. Circuit misinterpreted the principles set forth by this Court in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *See Odah v. U.S.*, 321 F.3d 1134, 1138-1145 (D.C. Cir. 2003).

In *Eisentrager*, this Court dismissed *habeas corpus* petitions by Germans who were convicted by a U.S. military tribunal in China shortly after the Second World War for violating the rules of war and were then repatriated to Germany to serve their sentences. *Johnson*, 339 U.S. at 765-66. Petitioners were "enemy aliens," since they were citizens of a State that was at war with the U.S. They argued, *inter alia*, that the military tribunal that convicted them lacked jurisdiction under international law. *Id.* at 785-90.

Justice Jackson, for the majority, reviewed all relevant sources of international law at the time, including treaties and customary international law. *Id.* at 786-90. He observed that petitioners had received all of the due process required under existing international law, including disclosure of the full particulars of their alleged war crimes and a trial before a military tribunal, at which other defendants were acquitted. *Id.* at 766, 786-90. Justice Jackson concluded that there was nothing about the

did so, in part based on its expectation that the U.S. would come into compliance with international law: "What appears to us to be objectionable is that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter. . . . As is clear from our Judgment, we believe that the United States Courts have the same respect for human rights as our own." *Id.* at ¶¶ 66, 107.

prosecution of petitioners that had infringed their rights under international law. *Id.* at 789. Their detention was lawful under international law, which provided that prisoners of war could be detained until the end of war crimes proceedings and, if necessary, until the expiration of the punishment. *Id.*

Much has changed in international law in the half century since *Eisentrager* was decided, yet Justice Jackson's approach remains correct. The obligations of the U.S. under international law must be rigorously considered and robustly enforced by the courts, wherever possible. Here, the analysis involves international human rights law, which emerged after the Second World War, as well as advances in international humanitarian law.

II. International Human Rights Law Requires Access to a Court or Tribunal

Under international human rights law, the U.S. is bound by treaty and customary international law to grant detainees access to judicial review concerning the lawfulness of their detention. This obligation arises in Petitioners' case as a result of the authority and control that the U.S. exercises over Guantanamo Bay, regardless of whether the U.S. retains ultimate sovereignty.

A. The United States' Obligations Pursuant to Treaty and Customary International Law

Since its affirmation in the Magna Carta,[5] the right against arbitrary detention has held a venerable spot in the history of Anglo-American law, taking its place in

[5] "No free man shall be taken, imprisoned, disseised [dispossessed], outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." The Magna Carta, ch. 39 (1215).

the American Constitution through the Due Process Clause of the Fifth Amendment. U.S. Const. amend. V. Generations of statesmen have described this right as a feature that distinguishes civilized democracy from tyranny[6] and totalitarianism.[7] As the values of the rule of law and due process have spread, the right against arbitrary detention has been included in the constitutions of States around the world.

Following the Second World War, the prohibition against arbitrary detention has also become entrenched in international human rights law. The U.S. is bound to observe this right through its treaty obligations and customary international law.

The treaty obligations of the U.S. flow from the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360, 368, which the U.S. ratified in 1992.[8] The ICCPR provides, in pertinent part:

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[6] In The Federalist No. 84, at 533, Alexander Hamilton quotes William Blackstone: "the practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument of tyranny. . .To bereave a man of life. . .without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny; but confinement of the person, by secretly hurrying him to jail, . . .is a less public, less striking, and therefore a more dangerous engine of arbitrary government."

[7] At the height of the Second World War, Sir Winston Churchill stated: "The power of the executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgement of his peers, is in the highest degree odious and is the foundation of all totalitarian government whether Nazi or Communist." Winston Churchill, Minute to the Home Secretary, 21 November 1943.

[8] The ICCPR has been ratified by 149 States. *See* I United Nations, *Multilateral Treaties Deposited with the Secretary General*, 164-65 (2003). The U.S. signed the ICCPR in 1977, and ratified it in 1992. *See Senate Resolution of Ratification of International Covenant*

> Article 9(1): Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law
>
> . . .
>
> Article 9(4): Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

As the plain language indicates, the essence of the prohibition against arbitrary detention is a right to judicial review.[9]

This right is also protected by customary international law, as reflected in a broad range of international instruments, decisions, commentaries and State practice. The Universal Declaration of Human Rights, which is recognized as an authoritative statement of customary inter-

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on Civil and Political Rights, 138 Cong. Rec. S 4781, *S4784, 102d Cong. (1992) (ratified Apr. 2, 1992). Congress, however, added a reservation that Articles 1 through 27 are not self-executing. *See* 138 Cong. Rec. at *S4784. In December 1998, President Clinton reinforced the commitment of the U.S. to protect and promote human rights under agreements to which it is a party, including the ICCPR. Exec. Order No. 13107, 63 Fed. Reg. 68991 (Dec. 10, 1998). The U.S. has not declared or communicated any derogation from its obligations under the ICCPR.

[9] *See, e.g., Vuolanne v. Finland*, No. 265/1987, Views of the Humans Rights Committee, CCPR/C/35/D/265/1987 at ¶9.6, 2 May 1989 (finding that review of petitioner's claim before a superior military officer lacked the "judicial character" of a court hearing, thus depriving petitioner of his right of recourse to a "court").

national law, contains the obligation to provide detainees with an opportunity to challenge their detention in court. Universal Declaration of Human Rights, Dec. 10, 1948, arts. 9-10, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810. This obligation is included in every other major international human rights convention which contains a general enumeration of rights.[10] There is also wide international practice in support of a principle akin to *habeas corpus* under international law.[11]

The consistency and weight of international practice is such that the distinguished authors of the Third Restatement assert that, as a matter of customary international law, a State violates international law if, as a matter of policy, it practices, encourages, or condones "prolonged

[10] *See, e.g.*, American Declaration of the Rights and Duties of Man, May 2, 1948, arts. XXV, XXVI, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) (expressing the obligations of members of the Organization of American States, including the U.S.); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5, 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 9, 999 U.N.T.S. 171, 6 I.L.M. 368; American Convention on Human Rights, Nov. 22, 1969, art. 7(5), 1144 U.N.T.S.123, 9 I.L.M. 673; African Charter on Human and People's Rights, June 27, 1981, arts. 6-7, 21 I.L.M. 58; *see also* African Commission Decisions in Communication Nos. 13/94, 139/94, 154/96, 161/97 (Saro-Wiwa v Nigeria) (holding that Article 6 prohibited arbitrary detention); 64/92 (Aleke Banda v. Malawi) (same).

[11] For example, the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly by Resolution 43/173 G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988), contains a requirement for judicial control (Principle 4), a right to legal assistance (Principle 17), a right to consult counsel (Principle 18) and a right to challenge the lawfulness of detention (Principle 32). The Body of Principles contains no provision for suspension of the guarantees in times of crisis.

arbitrary detention." *Restatement (Third) of Foreign Relations Law of the United States* §702, n.6 (1987).

B. The United States' Obligations Arise Through Authority and Control

Under international law, States are obliged to respect and protect the right against arbitrary detention whenever they exercise authority and control over a person, regardless of where the detainee is being held, and regardless of the detainee's nationality. Thus, this obligation applies to the U.S. in respect of Petitioners.

International tribunals consistently hold that the responsibility of a State to secure basic human rights established in international law for the benefit of individual persons does not hinge on the presence of such persons within the sovereign territory of the State, or their nationality, but rather on whether such persons are subject to the authority and control of the State. One of the fundamental purposes of the recognition of the right against arbitrary detention was to prevent abuse by States shifting the site of detention outside their borders, so as to avoid domestic laws. Consequently, Cuba's "ultimate sovereignty" over Guantanamo Bay is irrelevant under international law.

The reach of the prohibition against arbitrary detention under international law has been addressed in the context of the ICCPR and the American Declaration of the Rights and Duties of Man, both of which apply to and bind the U.S. *See* ICCPR, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory *and subject to its jurisdiction* the rights recognised in the present Covenant.") (emphasis added); American Declaration of the Rights and Duties of Man, May 2, 1948, arts. XXV, XXVI, *reprinted in* Basic Documents Pertaining to

Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

The United Nations Human Rights Committee, which is responsible for monitoring compliance with the ICCPR, determined that a State party may be held accountable for "violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it." *López Burgos v. Uruguay*, No.52/1979, Views of the Human Rights Committee, CCPR/C/13/D/52/1979 at ¶12.3, 29 July 1981 (finding petition concerning the kidnapping and detention of petitioner's husband by Uruguayan agents in Argentina admissible for review); *see also Casariego v. Uruguay*, No.56/1979, Views of the HRC, CCPR/C/13/D/56/1979 at ¶¶10.1-10.3, 29 July 1981 (where petitioner was arrested and detained incommunicado by Uruguayan agents in Brazil, holding that a State is "accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it"). The Committee further held that it would be "unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." *Burgos*, at ¶12.3.

Likewise, in interpreting the American Declaration of the Rights and Duties of Man, which the U.S. has conceded it is bound by, the Inter-American Commission on Human Rights determined that State Parties must secure the rights set out by the Declaration, regardless of where the State Party detains the petitioner. *See Coard v. United States*, Case 10.951, Inter-Am. C.H.R. Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. at 1283

(1999) at §§ 37, 39, 41 and 43 (where U.S. detained petitioners during military occupation in Grenada, noting that the U.S. conceded that it was bound by the Declaration, and holding that "the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether . . . the State observed the rights of a person subject to its authority and control").

In addition, throughout Europe, courts have held that a State is liable for acts of its agents even on another sovereign's territory. The European Commission and the European Court of Human Rights have interpreted "jurisdiction" under the European Convention on Human Rights as extending protection to individuals, regardless of their nationality, in places where they are subject to the actual control of agents of State Parties, even if those places are outside the territory of the State. *See Cyprus v. Turkey*, App. No. 8007/77, 13 DR 85 (1977) (holding that basic tenet of the Convention provides that States are "bound to secure the rights of all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad"); *see also Loizidou v. Turkey*, App. No. 14318/89, 23 Eur. H.R. Rep. 513 (1996); *Bankovic v. Belgium and 16 Other Contracting States*, App. No. 52207/99, 12 December 2001, 11 B.H.R.C. 435; *Ocalan v. Turkey*, App. No. 46221/99, 37 Eur. H.R. Rep. 10 (2003).

This approach to the extraterritorial reach of the duties of States is further reflected in the principles of international law concerning State responsibility. These affirm that a State is responsible for the conduct, *inter alia*, of persons or entities exercising elements of governmental authority, or acting on the instructions of, or under the direction or control of, that State. The criterion

is the link between the person said to have undertaken the conduct and the State in question. The nationality of the persons affected by the conduct, or their presence within the sovereign territory of the State in question, is immaterial. *See* United Nations International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 83, U.N. GAOR, 56th Sess., Supp. No. 10 and Corrigendum, U.N. Doc. A/56/83 (2001).

III. International Law Requires Due Process During Armed Conflict

On September 11, 2001, the U.S. was struck by terrorists, against whom it must continue to protect itself vigilantly. However, in international law there is no concept of a "war on terror," which releases States from their obligation to respect the right against arbitrary detention. International law governs all manner of detentions arising from violent conflicts, preserving a just balance between due process and compelling security interests.

The prohibition against arbitrary detention under international human rights law is not displaced by circumstances of armed conflict. In any event, similar due process rights for detainees apply under the "laws of war," also known as "international humanitarian law."

A. Obligations Under International Human Rights Law Continue During Armed Conflict

The obligation to respect the right against arbitrary detention under the ICCPR continues to apply in circumstances of military occupation and military rule. *See Legality of the Threat of Use of Nuclear Weapons*, (Advisory Opinion) 1996 I.C.J. 226, 240 (June 24) (holding that "the protection of the [ICCPR] does not

cease in times of war, except . . . [where] certain provisions may be derogated from in a time of national emergency"); *see also* Concluding Observations of The United Nations Human Rights Committee, 63rd Sess., CCPR/C/79/Add.93 at ¶10 (1998) (holding Covenant applicable where State exercises "effective control").

International human rights tribunals have held that, even where national security is involved, administrative hearings without the benefit of counsel do not meet the requisite standard of judicial or quasi-judicial review. For instance, the European Court of Human Rights held that a person detained pending deportation for security reasons was deprived of his right to judicial review, where he had a hearing before an advisory panel but was denied legal representation and was given only an outline of the grounds for his deportation. *See Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413 (1997).

B. International Humanitarian Law Requires Due Process During Armed Conflict

An overriding objective of international humanitarian law, or the laws of war, is to ensure that every detainee is assigned a status in order that he may receive rights and privileges appropriate for his status. As it stands, Petitioners find themselves in precisely the sort of "legal black hole" that international humanitarian law aims to seal off.

The U.S., along with 190 other States, has ratified both the 1949 Convention Relating to the Treatment of Prisoners of War ("P.O.W. Convention"), Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, and the 1949 Convention Relating to the Protection of Civilian Persons in Time of War ("Civilian Convention"), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, which apply to "all cases of

declared war or any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them." P.O.W. Convention, art. 2; Civilian Convention, art. 2; *see also Legality of the Threat of Use of Nuclear Weapons*, 1996 I.C.J, 226, 257 (Advisory Opinion) (holding the terms of the Conventions binding as a matter of customary international law, since the rights they protect are so "fundamental" as to be "intransgressible").

The Conventions have been supplemented by two additional protocols, which, like the Conventions, are regarded as part of customary international law and have been followed by the U.S. in its regulations and in previous conflicts.[12]

The Conventions provide for the protection of persons detained in circumstances of armed conflict, either as prisoners of war entitled to the benefits of the P.O.W. Convention or as civilian detainees protected under the Civilian Convention. *See* P.O.W. Convention, art. 5; Civilian Convention, arts. 71-76, 132, 133; *see also* 4 International Committee of the Red Cross, *Commentary on the Geneva Conventions of 12 August 1949* (1958)

[12] In its *Operational Law Handbook*, the Judge Advocate General's School, U.S. Army, states "that the US views [among others, Articles 45 and 75 of the First Additional Protocol] as customary international law." Judge Advocate General's School, U.S. Army, *Operational Law Handbook*, JA 422 at 18-2 (1997). This statement is qualified in the 2002 edition of *Operational Law Handbook*, in which it is now said that the U.S. views Article 45 of the First Additional Protocol as "customary international law or acceptable practice though not legally binding." Judge Advocate General's School, U.S. Army, *Operational Law Handbook*, Ch. 2 (2002). However, there is no evidence to suggest, and none is offered, that customary international law has changed in this way since 1997. *See* Michael J. Matheson, Remarks, *The U.S. Position on the Relation of Customary Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U.J. Int'l L. & Pol'y 419, 427 (1987).

("Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Geneva Convention, a civilian covered by the Fourth Geneva Convention. . . there is no intermediate status; nobody in enemy hands can be outside of the law."). Any detainee claiming the status of prisoner of war or appearing to be so entitled is presumed to be a prisoner of war, and retains that status until such time as his status has been determined by a competent tribunal. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("First Additional Protocol"), art. 45, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977). Furthermore, any detainee not falling under the P.O.W. Convention or the Civilian Convention, such as an "unlawful combatant," is entitled to the benefits of Article 75 of the Additional Protocol, which guarantees humane treatment and due process before a court for any penal proceedings. *See* First Additional Protocol, art. 75.

During the Vietnam War, the U.S. Military Assistance Command issued comprehensive criteria for the classification and disposition of detainees, providing for the systematic classification of detainees into "prisoner of war" and "non-prisoner of war" categories. *See* Military Assistance Command Vietnam, *Directive Number 381-46*, Annx. A, (27 December 1967). Extensive provision was made for due process in the determination of eligibility for prisoner of war status in cases of "non-prisoners of war and doubtful cases who are captured by or are in the custody of U.S. forces." *See* Military Assistance Command Vietnam, *Directive Number 20-5*, (15 March 1968). In particular, the military laid down the principle that, "[t]he Detainee shall have the right to be present with his counsel at all open sessions of the tribunal," required time with counsel, free access by coun-

sel and interviews in private, opportunity to confer with essential witnesses and rights of cross-examination. *Id.*

The treatment of Petitioners in this case is a marked departure from the procedures mandated by international humanitarian law and followed by the U.S. in the past.

First, the U.S. has not acknowledged or determined Petitioners' status as "prisoners of war." This is contrary to the presumption of "prisoner of war" status under the First Additional Protocol, which may only be displaced through due process in a competent tribunal. *See* First Additional Protocol, arts. 45(1)-(2). Additionally, "prisoners of war" status entitles Petitioners to a host of rights and privileges specified under the P.O.W. Convention.

Further, because Petitioners have not been given status in accordance with the Conventions and additional protocols, there is no framework in which to ensure they are not detained any longer than permitted or justified under international law. Under Article 132 of the P.O.W. Convention, prisoners of war must be released upon the cessation of hostilities. The Civilian Convention contains an analogous provision ensuring the release of civilians detained in circumstances of armed conflict (on narrow permissible grounds, such as "definite suspicion" of hostile activity) when the reasons which necessitated their internment no longer exist. *See* Civilian Convention, art. 132.

Moreover, if the U.S. intends to bring any penal proceedings against Petitioners, they are entitled to legal representation and a hearing before a judicial tribunal. Article 75 of the First Additional Protocol, recognized as customary international law, provides that detainees are entitled to the rights of defense, including assistance by a qualified advocate or counsel "who shall be able to visit them freely and shall enjoy the necessary facilities

for preparing the defence." First Additional Protocol, Art. 75(4)(a). Further, the Geneva Conventions protect detainees against "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." P.O.W. Convention, art. 3; Civilian Convention, art. 3; *see also* First Additional Protocol, art. 75 ("No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.").

Finally, it has been suggested that detainees in Guantanamo are "unlawful combatants." This classification was not used by the D.C. Circuit Court in characterizing Petitioners' status and it does not appear in either international human rights law or international humanitarian law. Nevertheless, even if Petitioners were labelled by the government as "unlawful combatants," they would still be entitled to due process rights under Article 3 of all four Geneva Conventions and Article 75 of the First Additional Protocol.

Conclusion

The prohibition against arbitrary detention is a fundamental principle of international law that applies whenever a State exercises authority and control, and applies in times of war as well as peace. The present detention of Petitioners is inconsistent with this basic human right. U.S. law should be interpreted to conform with obligations under international law, preserving the role of the U.S. as a leader in the advancement of ordered liberty, and meeting the expectations of fellow enlightened democracies.

Respectfully submitted,*

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* Submitted and filed with consent of all parties.